

MEMORANDUM

TO: Members, Clark Fork Basin Water Management Task Force (Task Force)
FROM: Gerald Mueller
SUBJECT: Summary of the November 5, 2007 Task Force Meeting
DATE: November 6, 2007

Participants

The following people participated in the Task Force meeting:

Task Force Members:

Harvey Hackett	Bitterroot
Fred Lurie	Blackfoot Challenge
Nate Hall	Avista
Ted Williams	Flathead Lakers
John Kappes	Mountain Water (for Arvid Hiller)
Jim Dinsmore	Upper Clark Fork
Marc Spratt	Flathead Conservation District/Flathead Chamber of Commerce
Steve Hughes	Joint Board of Control & Lake County
Caryn Miske	Flathead Basin Commission
Gail Patton	Sanders County Commissioner

Ex Officio Member

Sen. Verdell Jackson

Public

Dr. David Shively	University of Montana, Department of Geography
Tim Bryggman	DNRC
Jay Weiner	Reserved Water Rights Compact Commission

Staff:

Curt Martin	DNRC
Gerald Mueller	Consensus Associates

Meeting Agenda

- October 1, 2007 Meeting Summary
- Updates
 - Task Force membership
 - Water Policy Committee Interim Committee
 - Sub-basin activities
 - Bureau of Mines and Geology Maps
- Basin Water Supply and Growth Conference
- Water Policy Interim Committee Priorities
- Hungry Horse Water Activities
 - Reserved Water Rights Compact Commission
 - Consultation with basin local governments
 - Consultation with the Confederated Salish and Kootenai Tribes
 - DNRC Actions
- Water Right System Policy Paper
- Next Steps
- Public Comment
- Next Meeting

October 1, 2007 Meeting Summary

The Task Force made no change to the October 1, 2007 meeting summary.

Updates

Task Force Membership - Gerald Mueller welcomed Caryn Miske, the Executive Director of the Flathead Basin Commission. John Tubbs is working on the Task Force appointments. Mr. Mueller reported that he sent a letter to James Steele, Chairman of the Confederated Salish and Kootenai Tribes, asking the Tribes to consider resuming an active presence on the Task Force.

Water Policy Committee Interim Committee (WPIC) - Gerald Mueller reported that WPIC met on October 24 & 25 in Choteau. Holly Franz attended the meeting, and told Mr. Mueller that WPIC requested its staff to draft bills on six topics. Details on these topics will be forthcoming at future WPIC meetings.

- Adjudication enforcement - Local area ranchers are interested in an enforceable decree, although the objections to their temporary decree have not been resolved.
- “Bucket-for-bucket” mitigation - The proposal would allow permitting for ground water wells to proceed without the hydrogeologic assessment required by HB 831 if the water withdrawn via the well would be replaced by the same amount.
- Requiring a notice of intent to drill a well - This requirement would allow people to assess whether a proposed well would be in the plume of a septic system.
- Strengthen water right enforcement.
- Montana Department of Transportation (MDT) water reservations - MDT asked for a bill that would allow it to pursue reservations in closed basins to provide water for wetland mitigation.
- Provide for local control of water quality permits.

WPIC will meet next on December 19-20 in Helena. This meeting was previously scheduled for Hamilton. The January meeting will be in Hamilton.

Sub-basin Activities - Fred Lurie reported on recent activities in the Blackfoot subbasin. This past year was marked by a severe drought in the Blackfoot. The subbasin drought plan was triggered and worked “ok.” Through the plan and Mike McLane’s efforts, the Montana Department of Fish, Wildlife and Parks (DFWP) was able to enforce its Blackfoot River Murphy water rights. Bonner Dam on the Blackfoot River was removed as a part of the Milltown Dam Superfund remediation. Two recent subdivision proposals in the subbasin were of note. A subdivision on Blanchard Creek was turned down twice by Missoula County. Also, a sewer system proposal at Seeley Lake was controversial. The portion of the subbasin in northern Powell County is subject to a quarter section zoning restriction, preventing division of land into areas smaller than 160 acres. This zoning keeps down the number of wells, but also makes many land transactions unaffordable. The 160 acre parcel is also not an economical size for ranching. Work continues restoring creeks and water flow in the middle portion of the subbasin. A temporary water rights decree will be issued soon for the Blackfoot.

Question - Has work started on the removal of the Mike Horse Dam?

Answer - The US Forest Service has decided that the dam will be removed, but work to do so has not yet started. The state has taken over the removal work. Ultimate responsibility for funding the removal will be determined via a Natural Resources Damage (NRD) lawsuit.

Jim Dinsmore reported on activities in the upper Clark Fork subbasin. An upscale subdivision is underdevelopment near Deer Lodge. Industrial surface water use is important in the Butte-Anaconda area, which is unusual in the Clark Fork basin. Additional groundwater development for industrial use is also underway in Butte. This water is of questionable quality and not suited for domestic use. Agreement on a consent decree for the Clark Fork River unit of the Superfund Natural Resource Damage lawsuit is expected by the end of this year. Milltown Dam is scheduled for removal as a part of the Superfund remediation. The fate of the associated 1911, 2,000 cubic feet per second hydropower generation water right is important to the subbasin. Related to the adjudication, the storage water rights claimed for several sub-basin dams, including Milltown, is not yet determined. This decision will have crucial implications for water management. The Montana Department of Environmental Quality (DEQ) is proceeding with development of a TMDL plan for Flint Creek which will not address Georgetown Lake. Homeowners around Georgetown Lake are seeking an NRD grant concerning lake water quality.

Question - Is it possible to distinguish between background ground water quality and metals contamination in the Butte aquifer?

Answer - The ground water aquifer in question is above the mining contamination, but the quality is still not good enough to use for domestic uses. Butte needs additional water for domestic use.

Bureau of Mines and Geology Maps

Curt Martin shared copies of the maps addressing ground water in the Clark Fork basin prepared by the Montana Bureau of Mines and Geology pursuant a contract related to last year's ground water conference.

Basin Water Supply and Growth Conference

Members of the conference planning committee, Marc Spratt, Matt Clifford, Curt Martin, David Shively, and Gerald Mueller discussed the draft concept paper for the conference. See Appendix 1. The Executive Director of the Montana Association of Counties, Harold Blattie, and Steve Killbreath of DEQ are also members of the planning committee. Highlights of the Task Force discussion follows:

- March 10, 1:30 pm - An effort should be made to include ground water information from a well driller such as Bill Gardner. Someone such as Mike McLane from DFWP surface water and someone from the Tribes to discuss reservation water resources should also be considered. A distinction should be made between physical and legal water availability.
- March 11, 8:35 a.m. - This panel should include a discussion of the implications of HB 831. It should also cover the coordination between DNRC and DEQ in issuing permits.
- March 11, 10:40 p.m. - The water management issue panel should also address well issues. Randy Overton may be a good presenter for aquifer storage and recharge.
- March 11, 1:00 p.m. - This panel should include a presentation on the State-Confederated Salish and Kootenai Tribal compact such as Jay Weiner to discuss the compact negotiations and downstream constraints on the use of Hungry Horse.
- We should attempt to secure engineering and attorney continuing education credits for attending the conference.
- We should plan for an attendance of about 120 people.
- We should provide conference speakers with questions for them to address to steer their presentations.

Hungry Horse Water Activities

Reserved Water Rights Compact Commission (Commission) - Jay Weiner, Compact Legal Counsel, reported on the activities of the Commission regarding Hungry Horse water. He began with a brief history of the negotiations. In 2000, the Confederated Salish and Kootenai Tribes made a proposal that involved ownership of the water on the reservation which the state rejected. In 2005, the parties attempted to negotiate an interim management agreement, but this effort did not succeed. This year, the Tribes made a new proposal with a focus on management and protection of existing uses. This proposal appears to have a good prospect of resulting in an agreement by June 2009. The staffs of the Tribes and Commission are discussing the proposal. The next Tribal-Commission negotiating session will be on December 12 in Pablo. In their proposal, the Tribes are apparently seeking to expand fishery protection via additional instream flow and to make infrastructure improvements. Any water flowing across the reservation to benefit the fishery may also be available for downstream uses.

On October 16, representatives of the three negotiating parties, the Tribes, state, and federal government, met in Boise with the Bureau of Reclamation (BOR) to discuss use of Hungry Horse water as a part of a compact agreement. BOR officials stated that while they accept the idea of using Hungry Horse water in this way, they are not the ultimate decision maker regarding use of Hungry Horse water. The operation of the project is subject to rules and constraints related to endangered species, flood control, and power system operation. BOR asked about the amount of water that the states and Tribes might request.

Mr. Weiner is researching the rules and constraints. Apparently there are flow rules involving 900 cfs and 3,200 cfs at different times. Also, DFWP is seeking to change the limit of the reservoir draft from 20 feet to 10 feet.

The federal legislation authorizing Hungry Horse includes language about providing benefits to Montana.

The compact route may be beneficial in addressing Hungry Horse storage because it could avoid the time and expense associated with the state negotiating a contract with the BOR. A compact might result in a block of water allocated to the Tribes which they could then market to other users.

Mr. Weiner is putting together an internal advisory group for the Commission including representatives of DNRC, DEQ, DFWP, and the Northwest Power and Conservation Council.

Question - Would a representative of the Task Force be welcome to attend meetings of the internal advisory group?

Answer - Yes.

Comment - The Task Force through Mr. Mueller or others should seek to attend these meetings.

Consultation with Basin Local Governments - Mr. Mueller reminded the Task Force of John Tubbs' interest in the support or at least acceptance of the basin counties of the state's attempt to negotiate a contract with BOR for Hungry Horse water. Fred Lurie has visited with the Powell and Granite County Commissions, and Granite County has written a letter of support. Mr. Mueller has visited with staff of Missoula County and the Missoula Commissioners will consider signing a letter to Mr. Tubbs tomorrow. Senator Jackson and Marc Spratt are planning a visit the

Flathead County Commissioners. Steve Hughes will visit with Lake County Commissioners. Commissioner Patton will seek a letter from Sanders County. Mr. Mueller was asked to contact Jon Sesso, the planner for Butte-Silver Bow.

Consultation with the Confederated Salish and Kootenai Tribes - Gerald Mueller reported that on October 12, 2007, he met with Clayton Matt, head of the Tribal Natural Resource Department, and Bill Foust, head of the Tribal Water Division, to discuss the Hungry Horse initiative. John Tubbs and Tim Bryggman participated in the meeting by telephone. Mr. Mueller requested the meeting to explain the *Clark Fork Basin Watershed Management Plan* recommendation regarding Hungry Horse and the related Task Force legislative initiatives. Mr. Mueller also expressed the Task Force's interest in coordination of state and Tribal requests to the BOR regarding Hungry Horse. Mr. Matt explained that the compact negotiating parties would be meeting on October 16 with the BOR to explore use of Hungry Horse water as a part of an eventual compact. Mr. Matt also stated that he sees advantages in terms of time and money of avoiding the normal contracting process through the compact.

DNRC Activities - John Tubbs has decided to pursue the BOR Hungry Horse cost allocation study for which the 2007 legislature appropriated \$260,000 for the biennium. As mentioned above, he is interested in receiving letters from the basin commissions.

Water Right System Policy Paper

Mr. Mueller led a discussion of the outline of the policy paper which is attached below as Appendix 2. Highlights of the Task Force discussion follow.

Question - What do you see as the forces that are changing the first-in-time, first-in-right water management system?

Answer - The paper outline lists three: a de facto priority resulting from the wells exempt from permitting; the increasingly heavy burden that individual water right holders bear to enforce their rights, and the integration of groundwater into the water allocation and management system.

Comment - The paper should address the fact that a number of water allocations are being made outside of the water rights system. One example is water set aside for endangered species allocation.

Comment - The paper should explain the difference between up front allocation through DNRC water right permits and the after-the-fact water rights adjudication. DNRC needs to get the permit decisions right.

Comment - In the current system, there is an important difference between physical and legal availability.

Comment - The time required for DNRC to issue a permit is an issue. The process takes so long because the permit is a property right, and people have a right to object to new permits. Objections are now addressed through contested case procedures. A different procedure giving DNRC more authority could reduce the time required to receive a permit. DNRC would need to enforce clear permit criteria and be willing defend its decisions in court.

After the discussion, the Task Force directed Mr. Mueller to prepare a draft of the paper for consideration at the next meeting.

Public Comment

There was no additional public comment.

Next Meeting

The next meeting was scheduled for Monday, January 7, 2008. The meeting will begin at 9:30 a.m. and end at 2:00 p.m. Lunch will be provided. The agenda will include discussion of WPIC issues and the water right system policy paper.

Appendix 1
OCTOBER 23, 2007 DRAFT

Water Supply and Growth in the Clark Fork River Basin

A Conference Cosponsored by:
Clark Fork River Basin Task Force
Montana Association of Counties

Montana Department of Natural Resources and Conservation
Montana Department of Environmental Quality
University of Montana Department of Geography

Purpose

To explore the basic facts and issues regarding the water supply and growth in the Clark Fork River Basin.

Dates

March 10 and 11, 2008

Place

University of Montana, Missoula, Montana

Target Audience

Tribal and local government officials (county commissioners, mayors, and tribal and city council members) and staff (city managers, city/county/tribal planners, etc.), state and tribal water management and planners, consultants, water users (irrigation districts, hydropower operators, water utilities, etc.), fish and wildlife managers, conservation/environmental organizations, academics (faculty and students), and interested public.

Suggested Agenda

Day 1 - Setting the Stage

- 11:00 am Registration
- 1:00 pm Welcome and Introduction (Gerald Mueller) (15 minutes)
- 1:15 pm Water law primer (Holly Franz, Clark Fork Task Force member) (15 minutes)
- State ownership and allocation of water
 - First-in-time, first-in-use
 - Tribal water rights
- 1:30 pm Basin water supply facts (Marc Spratt, Clark Fork Task Force Member & RLK Hydro) (30 minutes)
- Clark Fork River basin water balance
 - Water use
 - Historic (surface water)

OCTOBER 23, 2007 DRAFT

- Recent (ground water)
- Basin water storage (present uses and constraints)
- Water short and water rich areas of the basin

- 2:00 pm Recent legal rulings (Tim Hall, former DNRC Chief Legal Council) (20 minutes)
- Thompson River Cogeneration water right (implication - high hurdle for new surface water right)
 - TU vs. DNRC (implication - surface and ground water interconnected)
- 2:20 pm Break (15 minutes)
- 2:35 pm Basin population and economic growth
- Demographics - Montana Department of Commerce Census and Economic Information Center (15 minutes)
 - Economy - Dick King, Missoula Area Economic Development Council (15 minutes)
- 3:05 pm Basin Water use projection (Tim Bryggman, DNRC Water Management Bureau Economist) (20 minutes)
- 3:25 pm Discussion (35 minutes)
- Conference participant questions and comments
- 4:00 pm Social and No-host bar

Day 2 - Growth and Water Supply Planning and Regulation

- 8:00 am Registration and Continental Breakfast (30 minutes)
- 8:30 am Welcome and Introduction (Gerald Mueller) (5 minutes)
- 8:35 am Who Makes What Decision in Planning for Growth - David Shively, Moderator (80 minutes)
- County growth policies, zoning, subdivision regulations, and critical area ordinances - Myra Schultz (20 minutes)
 - What authority do they provide counties to regulate water supply?
 - State subdivision regulations - Steve Kilbreath (20 minutes)
 - How do they relate to water supply?
 - Ideas for improving growth planning and management - Michael Kakuk and Tim Davis (20 minutes)
 - Participant questions and comments (20 minutes)
- 9:55 am Break (15 minutes)
- 10:10 am Managing the Water Supply (30 minutes)
- DNRC water right regulation - Bill Schultz, DNRC Regional Water Resources Manager
 - Water availability analysis (physical and legal)
 - Coordinated surface and ground water regulation

OCTOBER 23, 2007 DRAFT

- Ground water permit exemptions
 - Participant questions and comments
- 10:40 am Water Management Issues - Arvid Hiller, Moderator (65 minutes)
- Individual or community water and septic systems, what is in the public interest?
- Jim Carlson, Missoula County Environmental Health Division and Steve Kilbreath, DEQ (20 minutes)
 - Exempt Wells - Rep. Jill Cohenhour (20 minutes)
 - Should ground water wells be exempt from water right permits?
 - Which ones should be exempt?
 - Aquifer Storage and Recovery - (*Speaker?*) (15 minutes)
 - What is it?
 - Who regulates it?
 - How does it impact on Public water supplies
 - Participant questions and comments (10 minutes)
- 11:45 am Lunch (75 minutes) - Senator Jim Elliott, Chairman of the Water Policy Interim Committee.
- 1:00 pm Potential Sources of Water for Growth - Task Force member (60 minutes)
- Ground water
 - Existing water rights
 - Hungry Horse contracts
 - Participant questions and comments
- 2:00 pm Break (15 minutes)
- 2:15 pm Improved Local, State, and Tribal Water Supply and Growth Planning - Participants will break into facilitated groups to discuss needs and ideas for improving planning and coordination (45 minutes)
- 3:00 pm Improved Local, State, and Tribal Water Supply and Growth Planning - Full group discussion (90 minutes)
- 4:30 pm Wrap Up - Matt Clifford (30 minutes)
- 5:00 pm Adjourn

Appendix 2
Status of the First-In-Time, First-In-Right Water Right Allocation and Management System

- I. Introduction
 - A. Historically, water in Montana allocated and managed according to the first-in-time, first-in-right system.
 - B. Forces underway to change that system.
 - 1. Priority based on water use.
 - 2. Enforcement challenges.
 - 3. Integration of groundwater.
- II. History of water allocation and use.
 - A. Pre-1973 Water Use Act
 - 1. New uses supported by new water rights.
 - 2. Individual and court water right administration and enforcement based first-in-time, first-in-right system.
 - 3. No centralized records.
 - 4. Ground and surface water managed separately.
 - B. Post-1973 Water Use Act
 - 1. Water rights permits issued by DNRC for new and changed water uses.
 - 2. Beginning of state-wide adjudication because of concern arising from coal development.
 - 3. Reserved federal and tribal water rights.
 - a. Reserved Water Rights Compact Commission.
 - 4. Greater concern about protecting instream uses - water leasing program; Bean Lake III Supreme Court decision.
 - 5. Water reservations by public entities provide for future water needs in the Missouri and Yellowstone basins.
 - 6. Basin closures as perception increases of over appropriation.
 - 7. Ground water source of new water development.
 - 8. Greater concern about conjunctive management of surface and ground water - TU vs. DNRC Supreme Court decision.
 - 9. Adjudication
 - a. Legislative priority to complete temporary preliminary decree by June 30, 2020, for all basins in Montana.
 - b. Test driving decrees
 - 10. Post Adjudication
 - a. All water rights in enforceable water right decrees.
 - b. Water right integrated - water management will have less of a local focus
 - c. Diversions measured.
- III. Water Administration and Management Today
 - A. Creating domestic use priority outside of traditional water allocation and management system.
 - 1. 35 gpm/10 acre-ft/yr ground water permit exemption.

SEPTEMBER 25, 2007 DRAFT

2. DNRC “manifold” expands use of exemption in new subdivisions.
 3. “Diminimus” domestic use.
 - B. Conjunctive management of surface and ground water.
 1. Induced infiltration and prestream capture of tributary ground water
 2. Permitting in closed basins
 - C. Enforcement system increasingly complicated and expensive for individual water rights holders
 1. Influx of people unfamiliar with water rights creating more conflicts.
 2. Difficult to get timely decisions from district courts
 3. Water right integration will create new relationships among water rights and likely reduce local focus of water management.
 4. Water right integration will pose new challenges for decree enforcement via water commissioners.
 5. Traditional agricultural water right holders cannot be able pay enforcement costs.
 - D. Water right changes
 1. Only consumptive portion of rights may be changed.
- IV. Clark Fork River Basin Water Supply
- A. No water reservations for future uses in the Clark Fork River.
 - B. Implications of the Thomas River Cogeneration water right decision.
 - C. Future supply alternatives
 1. Hungry Horse contract(s)
 - a. Private contracts
 2. Purchasing existing water rights
 - a. Likely shifts water away from agriculture